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No. _____

In The
Supreme Court of the United States

RICHARD J. MANCIK, KRISTINE A. MANCIK,
Petitioners,

v.

NELSON WESTRIN, RICHARD JEWELL,
LARRY SMITH, LIONEL SWAN, RICHARD GRAJEK,
JOSPEH KENNEDY, Individually and Severally,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

RICHARD J. MANCIK
KRISTINE A. MANCIK
129 ALPENA
NEW HUDSON, MI 48165
(248) 486-9349

Pro Se

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED FOR REVIEW

1. May an appellate court substitute a version of the facts not in conformity with the record and contrary to the findings of the administrative appeal hearing and the state circuit court presented after extensive testimony by all of the parties?

2. May an appellate court ignore the strict construction of the statute by adding an essential term thereby changing both the statute and its application?

3. When limited consent is given for an administrative inspection, and that consent is derived by coercive threats and intimidating tactics, is the search permissible in conformity with the holdings of this Honorable Court that defined "voluntariness" of consent?

4. May a warrantless search continue after the limited consent given for that search has been rescinded due to that search exceeding its bounds and becoming both generalized and indiscriminate?

5. In light of this Court's holdings in many cases concerned with pervasively-regulated industries, may an inspection scheme devoid of any definable frequency or regularity of inspection adequately substitute for the protections offered by the search warrant requirement?

6. May a warrantless search of the curtilage of the residence be conducted with neither consent for that search nor the presence of an exigent circumstance?

PARTIES TO THE PROCEEDINGS

Petitioners

Richard J. Mancik and Kristine A. Mancik. Petitioners are individuals and have no corporate affiliations.

Respondents

Nelson Westrin, Richard Jewell, Larry Smith, Lionel Swan, Richard Grajek and Joseph Kennedy, individually and severally.

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reprinted as Appendix A at 1a; the opinion of the Michigan Circuit Court is reprinted as Appendix B at 10a; the opinion of the Michigan Supreme Court is reprinted as Appendix C at 37a; and the opinion of the Administrative Appeal Hearing is reprinted as Appendix D at 39a.

JURISDICTION

This Court has certiorari jurisdiction by virtue of Title 28, United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE

The Fourth Amendment to the United States Constitution "protects people and not simply 'areas'- **against unreasonable searches and seizures**." *Katz v. United States*, 389 U.S. 347, 353 (1967). (emphasis added)

STATEMENT OF THE CASE

Petitioners lived in a two room apartment adjoining a horse barn located on the training farm which they had leased for twelve years. This barn, and the second barn seventy five feet away which was newly built by these petitioners, was enclosed and separated from the rest of the property. Because the living space in the residence was insufficient to store all of the petitioners' possessions, clothing and personal papers were kept within tack trunks in the second barn. Neither that

farm nor any farm housing racehorses was licensed by the Michigan Racing Commission. Only individuals, such as owners, trainers, grooms, drivers, or track vendors were licensed by the Commission.

On August 1, 1993, a horse trained by Rick Mancik's late father won a race. A post-race test demonstrated the presence of an illegal substance. Petitioner's father testified at a Stewards hearing as did the petitioner. Both denied complicity but, pursuant to the Trainers Responsibility Rule, the elder Mancik's license was suspended. Petitioner then applied to the Commission to take over as trainer of the stable and he was permitted to do so without restriction.

On August 12, 1993, four investigators, the State Veterinarian, and Racing Commissioner Westrin, arrived unannounced at petitioners' facility in two unmarked vehicles. They produced no identification and petitioners knew only a few of the officials. The respondents got out of the vehicles and approached Rick Mancik who was standing next to the closed barn door. Larry Smith approached Mancik and requested that he consent to an inspection of the three horses entered to race within the next seventy two hours and the racing equipment of those three horses. Nothing else was requested. No request was ever made to search either of the two barns or to inspect any of the other horses or other racing equipment.

Because of the intimidating nature of the arrival of these individuals on his property, Rick Mancik gave a limited but reluctant consent to have inspected specifically what was requested. This consent was limited and circumscribed; never, at any time, was consent either given or intended for a search of the barn, for entrance into the barn, or for an examination of the contents of closed cabinets and tack trunks

within the barn. He accompanied the state veterinarian to an outside paddock to secure the first of the horses for inspection. He turned around and saw that the four investigators had opened the barn doors and, without permission, stormed the barn. Rushing back to the barn, he and his wife witnessed closed cabinets being opened and tack trunks being overturned with their contents strewn throughout the barn. Mancik saw that this was occurring contrary to the limit of the consent given or his intentions that the scope of search be restricted to what was requested. This was not a 'plain view' search because what was regarded by these respondents as contraband was contained within closed containers. Both petitioners requested the respondents to cease the search or produce a valid search warrant. Respondent Smith told petitioners that a warrant was not required, that they didn't have one, and that no consent was required to perform the search of the barn. The Manciks requested that respondents leave the premises, which they did after seizing items from the closed cabinets. Unfortunately, no inspection was made of the three horses nor of their racing equipment although this was the pretextual enunciated purpose of the visit.

The Commission suspended the license of petitioner Richard J. Mancik. After an appeal hearing before Administrative Law Judge Mark Plawecki, Mancik was found guilty of possessing what were regarded as illegal medications and injecting paraphernalia. He was found not guilty of the charges of failing to cooperate with the inspection. Judge Plawecki heard from and examined all of the witnesses from both the farm and the Commission, including Commissioner Westrin. His decision (Appendix D) opined that the search was an overzealous indiscriminate warrantless search of the curtilage that involved a rummaging and ransacking of the barn and its contents. He found the search to be the first off-

track inspection ever performed by the Commission during its entire 61 years of regulating pari-mutuel horseracing pursuant to statute. Furthermore, he found the search to be both statutorily and constitutionally questionable. He stayed all penalties until the case could be brought before the court to test the constitutionality of the statute. Commissioner-Respondent Westrin , both a search participant and a witness at the hearing wrote a superceding opinion which overturned the holding of his own supposedly impartial hearing officer. Westrin's account of what transpired at the search was a self-serving account of events which conformed neither with reality nor with the testimony of the witnesses. Petitioners appealed that administrative decision to the Michigan Circuit Court and concurrently sued the respondents in their individual capacities under 42 U.S.C. Sect. 1983. The case was heard in the Michigan Circuit Court for the County of Wayne (Hon. Judge Jeannie Stempien). The Court heard four sessions of oral arguments and read the numerous briefs provided by both sides. After a lengthy time for evaluation, the Court rendered an opinion (Appendix B). It concurred with the opinion of Judge Plawecki holding that the statute was unconstitutional with respect to off-track inspections in that it did not provide for warrantless searches offtrack. It found that the search was overly intrusive and that the barn search was performed without consent. Furthermore, it denied that there could be an 'implied consent' exacted for an illegal search.

Respondents appealed the Circuit Court decision to the Michigan Court of Appeals. That Court's opinion (Appendix A), overturning in its entirety the lower court decision, is the basis for petitioners' writ to this Honorable Court. Petitioners, in appealing to the Michigan Supreme Court, cited the many errors of fact recited in the Appeals Court decision and the failure to address the constitutional issues

which so strongly impact this case. Unfortunately, the Michigan Supreme Court, in a 5-2 decision (Appendix C) declined to hear petitioners' appeal. Therefore, within the 90 days allotted, petitioners pro se have submitted this brief in support of the requested writ.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS INCORRECTLY CHANGED ESSENTIAL FACTS CONCERNING CONSENT, THEREBY NEGATING IT'S RESPONSIBILITY TO DECIDE ON THE CONSTITUTIONALITY OF PETITIONERS' CASE. IN DOING SUCH, THAT COURT NOT ONLY CORRUPTED THE RECORD BUT ADDITIONALLY FAILED IN ITS OBLIGATION TO ACCEPT DISPUTED FACTS IN A LIGHT MOST FAVORABLE TO THE NON-MOVANT PARTY

The Michigan Court of Appeals failed in its obligation to interpret the disputed facts in a light most favorable to the non-movant. *5 Moore's Federal Proc.* 2316 (2nd ed., 1951). This Court addressed that requirement in *Continental Co. v. Union Carbide*, 370 U.S. 690, 696 (1962). It stated that the Court of Appeals was " bound to view the evidence in the light most favorable to [the non-movant] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.". The Michigan Supreme Court decided that the decisions of administrative hearings and lower court decisions must be upheld if the decisions were "supported by competent material and substantial evidence on the whole record." *Viculin v. Dept. of Civil Service*, 86 Mich 375, 192 N.W. 2d

449, 458 (1971), but nevertheless, in the instant case, declined to intervene even with this requisite set of circumstances. This Court stated in *Universal Camera Corp. v. NLRB,* 340 U.S. 471, 490-91(1951) that " it will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." The administrative judge heard and examined the testimony and scrutinized the physical presence of all of the witnesses; it heard extensively from the petitioners as well as the respondents. The Michigan Court of Appeals heard from no one. The Michigan Circuit Court heard from both parties many times in oral arguments; it had the benefit of arriving at its' decision after reading and evaluating the combined briefing received from both parties; the Michigan Court of Appeals had no such comparable insight. The Court should have followed the advice it gave in *Boyd v. Civil Service Commission*, 220 Mich. App. 226,233 (1996) where it stated that "

> the question of whether substantial evidence supports a state agency finding has been placed by our state constitution in the hands of the court of direct review, e.g the Circuit Court in this case. Const 1963, Art 6, Sect 28. To hold that this Court....must also conduct a direct review of the agency's findings is to contravene the plain terms of our state constitution and to vitiate the sieve-like nature of the appellate process." It should have followed guidelines which would have prevented it from substituting their second and third hand opinion of facts for facts reviewed first hand by the administrative hearing and the Circuit Court. Federal Rules of Civil Procedure 52(a) states that "findings of fact

shall not be set aside unless clearly erroneous."

II.

THE COURT OF APPEALS FAILED TO NOTE THE OBJECTIONS MADE BY PETITIONERS THAT THE LIMITED CONSENT THEY GAVE FOR THE SEARCH WAS DERIVED FROM CONDITIONS AND EVENTS THAT WERE HARDLY VOLUNTARY.

The appellate court found the issue of consent dispositive to the case and therefore found a convenient rationale not to address the constitutional challenges made by petitioners. It found, by a very circuitous route, that both the yearly application procedure as well as the actual consent at the time of search were voluntary according to legal precedent. It based its decision supposedly upon the wording of the statute, a sketchily drawn and imposed subjective legislative intent, and on the subjective intent supposedly held by the petitioners. It unfairly constructed a mindset for the petitioners that they never had nor was ever evident in the entire record.

First, these petitioners were the first licensees ever confronted with an off-track search of a farm/residence. In the entire 61 year history of regulating horseracing in Michigan, no off-track farm search had ever been conducted. Suddenly, out of the blue, without any warning and without rational explanation, two unmarked vehicles drove onto the property and six individuals disembarked. This was an unprecedented and blatant show of authority, *Bumpers v. North Carolina*, 391 U.S. 543 (1968), and exemplified the overbearing and intimidating custodial atmosphere that the Court examined in *United States v. Jones*, 846 F. 2d 358 (6th

Cir. 1988). The conditions imposed by the respondents hardly equated with a non-coercive and unintimidating atmosphere that could have produced a truly voluntary consent. *Schneckcloth v. Bustamonte*, 412 U.S. 218 (1973). Nevertheless, when the limited request was made to examine three horses that had been entered to race and their racing tack (equipment), petitioners accepted that request at face value and gave a limited and circumscribed consent for exactly that . . . and no more.

III.

THE COURT OF APPEALS FAILED TO NOTE THAT THE INITIAL LIMITED CONSENT GIVEN TO THIS WARRANTLESS SEARCH OF SPECIFICALLY NAMED PROPERTY WAS RESCINDED IMMEDIATELY WHEN THE SEARCH BECAME AN INDISCIMINATE GENERALIZED SEARCH OF CLOSED CONTAINERS WITHIN THE CURTILAGE – FOR WHICH NO CONSENT WAS EITHER REQUESTED OR GIVEN

Upon voluntarily accompanying the state veterinarian to an outside paddock to retrieve the first of the requested horses, petitioner turned around and saw that these respondents had, without permission, opened the barn door and entered the barn. When he rushed back, he noticed that closed cabinets were being opened and tack trunks overturned with their contents being strewn about the entire barn. As the Circuit Court reasonably held, petitioner had given no consent for that which was occurring. Both petitioners requested the respondents to produce a search warrant or leave the premises. Larry Smith told petitioners that there was no warrant, that none was obtained or brought, and that neither a warrant nor their consent were required to perform such a

search under the statute. Petitioners rescinded the voluntary consent given to inspect the three horses and their equipment as soon as they saw the barn stormed and invaded without their permission. As the Court stated in *United States v. Dichiarinte*, 445 F. 2d 126, 129-30 (7th Cir. 1971), "A consent search is reasonable only if kept within the bounds of actual consent . . . A defendant's consent may limit the extent or scope of a warrantless search in the same way that the specifications of a warrant limit a search pursuant to that warrant."

The Michigan Court of Appeals failed to note anywhere in its opinion that what had transpired was not a routine voluntary consent to a routine search but rather an unauthorized intrusion of the curtilage with neither consent nor an indispensable warrant.

> Hopefully, the *Biswell* and *Burger* cases have marked the end of resort to artificial concepts of voluntariness as a means of avoiding more fundamental questions about the legality of various inspection schemes. If there is consent under the *Schneckcloth* voluntariness test, it is not inappropriate for a court to uphold the inspection on this basis. But if a businessman admits the inspector only after being told that the inspector has a right to conduct a warrantless inspection, this is not consent but mere acquiescence to a claim of lawful authority no different than that involved in *Bumper v. North Carolina*. If the inspector makes such a claim, then, as properly concluded in *Biswell*, "'the legality of the search depends not on consent but on the authority of a valid statute.'" [*Search and*

Seizure, A Treatise on the Fourth Amendment, Third Edit., Wayne R. LaFave, West Publ., 1996., vol.4, Chapter 10 Section 10.2(b), p. 410].

IV.

THE COURT OF APPEALS FAILED TO APPLY STRICT STATUTORY CONSTRUCTION, AND IN THIS FAILURE, APPROVED A SEARCH THAT WAS PATENTLY STATUTORILY UNCONSTITUTIONAL

Obviously, the warrant requirement is an important legal safeguard and has served a valid purpose throughout our history. Only certain exceptions exist which excuse this requirement. For the Court to ignore the fact that a statute does not call for a warrantless search is either unforgivable oversight or a failure to adhere to strict statutory construction. Neither the first public act regulating pari-mutuel horse racing in Michigan nor any of its succeeding statutes contain language which states that the consent to inspection is a consent to a warrantless search. Indeed, the P.A. 199 (1933) called for no inspection whatsoever. The legislature revised the statute in 1980 and in 1995, amending the 1995 statute. In no case did any of these revised statutes or amendments contain language which could be construed as permitting warrantless searches. There is no legislative intent, either objective or subjective, which could hint that the Michigan Legislature intended to deviate from the normal conditions and requirements of inspection imposed upon regulators.

This Court, beginning with *United States v. Biswell*, 406 U.S. 311, 317 (1972) pointedly reminded that inspections and searches of what were considered pervasively-regulated

industries " may proceed without a warrant *where specifically authorized by statute*." (italics added). Again, in *Donovan v. Dewey*, 452 U.S. 594 (1981) and *New York v. Burger*, 482 U.S. 691 (1987), there was language which informed that the consent requested of licensees was for warrantless search--search without the protection of a warrant. Indeed, in *United States v. Branson*, 21 F. 3d 113 (6th Cir. 1994), the inclusion of specific language mandating search without a warrant made the challenged statute unassailable. This Court, in *Burlington No. R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987) decided that in the absence of a clearly expressed legislative intention to the contrary, statutory language "must be regarded as conclusive." [quoting *United States v. James*, 478 U.S.597 (1986)]. That decision further stated that

> The position taken by the Court of Appeals is also unsatisfactory. The court found that some disputes as to state valuation of railroad property may be the subject of a federal claim under Section 11503, but only where the plaintiff alleges, and makes a preliminary showing, that the overvaluation results from discriminatory intent. App to Pet. For Cert. 10a; *Burlington Northern R. Co.* v. *Lennen*, 715 F. 2d at 498. **The statute provides no support for this interpretation.** *Burlington* at 463 (emphasis added).

This opinion confirms the fact that this Court recognizes that appellate courts who put a spin on the statutory language to arrive at an outcome not possible otherwise are acting outside of their limited power. This Court in summarizing *Burlington* stated that " The Court of Appeals' suggested interpolation of an intent requirement

draws no support from the statute's language and is inconsistent with its expressed purpose." *Id.* at 464. That same type of judicial interpolation of statutory language and subjective intent brought about a decision based upon a supposedly voluntary consent to a warrantless search and was therefore dispositive to the case; the result of this ill-conceived decision excused the necessity to address and fully evaluate other important constitutional issues. In the instant case, the Michigan Court of Appeals was required to interpret the statute and its application according to the plain language of the statute rather than what it desired that language to be.

The Court in *Pfizer, Inc. v. Heckler*, 735 F. 2d 1502 (D.D.C., 1984) stated that "Deference to agency interpretations is not in order if the rule's meaning is clear on its face." That Court also held that

> As a threshold matter, we decline to give the Statement controlling weight [in interpreting the MAC regulation] because the language of the regulation itself is clear and unambiguous. Under settled principles of statutory and rule construction, a court may defer to administrative interpretations of a statute or regulation *only* when the plain meaning of the rule itself is doubtful or ambiguous. *Id.* at 1509. Second, even if it were appropriate for this court to defer to an agency's interpretation of a regulation that is clear on its face, the amount of deference to be accorded such an interpretation depends upon the purposefulness of the agency's interpretation, the depth and care of the agency's reasoning, and the interpretation's

consistency with prior and subsequent interpretations by the agency. *Id.* at 1510.

This instructive analysis should have been on the minds of the Michigan Court of Appeals when it peremptorily gave affirmation to the Commission's misinterpretation that the statute they regulated under permitted a warrantless search rather than one with a warrant. The Court should have accorded only the most minimal deference to the agency's opinion concerning the proper procedural manner of inspection when it became cognizant of the plainly apparent fact that absolutely no off-track farm inspection was performed until the one in question here. It should have been sensitive to the issue of voluntariness in this case and had no logical reason not to recognize that an intrusive search of curtilage was far outside the allowable boundaries of statutory language.

More recently, in *United States v. Kinder*, 64 F. 3d 757 (2nd Cir. 1995) that Court held that "courts may, of course, in the interpretation of a statute, adopt an interpretive ruling of an expert administrative body, even if created in a different (but parallel) context, so long as the resulting interpretation is consistent with the commands of the statute." 64 F. 3d at 761. It clearly sent a message that a regulatory agency cannot change a prior interpretation of a statutory term and neither can the court, if the language and meaning of that language is clear and unambiguous. Petitioners argue that the Michigan Court of Appeals cannot change or ignore an essential term of a statute to allow an application contrary to that anticipated by the plain statutory language. Relying on its holding in *United States v. Palacio*, 4 F. 3d 150 (2nd Cir. 1993), the court again decided that "in the absence of new guidance from Congress, we would not reinterpret a statutory term ' when our initial construction of a statute is solely the

result of an independent judicial interpretation of a statutory term, rather than deference to the reasonable interpretation adopted by an agency." *Id.* at 760.

This Court, in *United States v. Lanier*, 520 U.S. 259 (1997), clearly stated that courts are strictly prohibited from applying novel constructions of statutes not evidenced by language of the statute itself or by precedent. Indeed, it stated that "The legislative intent [of Congress] is to be derived from the language and structure of the statute itself, if possible, not from the assertions of codifiers directly at odds with clear statutory language." *Id.* at 266. In *United States v. Wells*, 519 U.S. 482,495 (1997), this Court directed that "we presume that Congress expects its statutes to be read in conformity with this Court's precedents. . . ." Petitioners recognize that this Court enunciated certain exceptional circumstances in which warrantless searches and searches of curtilage are permissible; it is their opinion that the search that occurred in the instant case was not one of those exceptions to the warrant requirement.

V.

PETITIONERS AT NO TIME INTENDED CONSENT PROVIDED FOR IN THE YEARLY LICENSE APPLICATION BE IMPLIED CONSENT TO PERMIT A WARRENTLESS SEARCH OF CURTILAGE.

Petitioners argue that neither the consent given nor the language of the statute under which it was supposedly conducted should have permitted such an indiscriminate warrantless intrusive search of their curtilage. The Michigan Court of Appeals' decision makes more political sense than common sense; it was intended to bypass a discussion of the

constitutional issues while still producing a sought after result. That decision held that:

> Finally, we also believe that the circuit court erred when examining the scope of the consent search agreed to verbally by plaintiff on August 12, 1993. Earlier in its opinion, the circuit court found that the officials who conducted the search had asked for permission to examine the three horses and their related tack. Later, the court also found that "[t]here is no disputed fact that [plaintiff] did not agree to the search of closets, cabinets, and the interior of the barn at the time of inspection." We believe that this finding was based on an improper focus on plaintiff's subjective intentions.

This Court, which has examined no witnesses nor examined the transcripts detailing events of the search in the exhaustive manner of both the administrative appeal hearing and the circuit court, somehow predisposed that these relatively uneducated petitioners somehow presupposed that a request to inspect three named horses and their equipment constituted a much broader request to invade the barn in which they had a great expectation of privacy. This Honorable Court can rest assured that these petitioners had no subjective intentions to voluntarily allow a search which constituted a rummaging and ransacking of that barn. When consent was given to inspect, it was given specifically for what was requested. It was never intended to allow the respondents to do any more or inspect anything beyond which had been requested by them. The appellate decision further stated that the objectively reasonable standard under the Fourth Amendment would permit a reasonable person to

expect that consent for an inspection of three specific horse and their equipment could constitute consent to invade and vandalize the barn because horses and equipment for those horses might be located there. This type of dangerous and calculated reasoning is neither logical nor reasonable; it is a pretextual excuse to condone the type of outrageously abusive and overreaching generalized searches that this Court long ago decried in *Go-Bart Co. v. United States*, 282 U.S. 344 (1931); *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977); *See v. Seattle*, 387 U.S. 541 (1967); and Camara v. Municipal Court, 387 U.S. 523 (1967). If the arguments of the Michigan Court of Appeals are accepted, it can do no less than act as a precursor to restore the excesses and abuses of the past. A reasonable individual without political motivation would conclude that these respondents would have requested to inspect the barn and its contents if that is in reality what they wanted to inspect. When one orders a steak in a restaurant, the waitress asks how you want it cooked and whether you want onions and mushrooms. A reasonable person would conclude that these are questions that should be asked rather than have the waitperson assume answers that have no basis in fact. The waitperson could hardly conclude that the customer had such subjective intentions; neither should the Michigan Court of Appeals impose their own version of subjective intentions on these petitioners.

The Court held that because Mancik did not say that the respondents could not enter the barn, overturn tack trunks and open locked containers, it would be objectively reasonable to assume that he had given them consent to do so. That is bad logic which ultimately produces bad law.

Ultimately, the case revolves around the statutory language itself to determine what each licensee had consented to and what the limitations of search were.

> The plain and unambiguous language of Sect. 11(3)(a) indicated that the scope of a consented to premises search was not limited to the racetrack itself. Rather, the scope included those areas "related to" the licensee's "participation in a race meeting." Such areas routinely include off-track facilities like plaintiff's business. While it is true that other subsections of MCL 431.71; MSA 18.966 (41) specifically and implicitly refer to the racetrack, this does not mean that Sect.11(3)(a) is similarly limited. Indeed, the fact that Section 11(3)(a) does not include either an explicit or implicit reference to the racetrack should be seen as a clear indication that the Legislature intended not to so limit its application. See *Farrington* v. *Total Petroleum, Inc.*, 442 Mich 201,210; 501 NW 2d 76 (1993).
>
> Although it does not specifically so state, we believe that the circuit court focused on this rule because it believed its language exemplified a presumption that was central to the court's opinion: namely, if the Legislature had meant to include off-track sites in the scope of a consent search conducted pursuant to Sect.11(3)(a),it would have explicitly provided for that in the statute.

Here again, the Court's decision fails to follow either fact, precedent, or logic. Where it is impossible to discern entirely the legislative intent, a history of the statute, the way it has been applied over a period of time, and the language of preceding statute provide a strong hint of what that intent was

and how it had been generally interpreted by regulators. First, the original statute, legislated as P.A. 199 (1933), the immediately preceding statute and one put into law at the time horseracing became regulated, failed to call for any inspection whatsoever. The statute in question in the instant case does not state in any manner that the inspection power extended from the exclusively controlled and restricted area of the racetrack to off-track farms; neither did it remark in any way that it did not. However, that statute, legislated as P.A. 327 (1980) had been on the books for nearly fourteen years prior to the search at issue here. During that long period of time, the Michigan Racing Commission had several different racing commissioners. Some of them had extensive legal backgrounds; one had been a chief judge. Yet, during that period, despite many positive tests, not one off-track farm search was initiated except for a possible exceptional case where the farm was notified well in advance and the scope of search was limited and not exceeded. Other than that, not one search was initiated although searches within the restricted confines of the racetrack were commonplace and expected. To state the case in its proper perspective, from 1933 until August 11, 1993, not a single off-track farm inspection was performed. This was the finding of both the administrative appeal hearing decision and the decision of the Michigan Circuit Court; it was not even mentioned by the Michigan Court of Appeals which, with such facility, ascribed an intent, not only to the petitioners in the instant search, but to a legislature that never expressed one.

The decision contested here decided that petitioner gave an implied consent every time they signed the license application. This Court and many lower federal courts have noted that this is hardly the case when the trade off entails the grant of a state occupational license in exchange for the surrender of constitutional rights. In order to race horses,

these petitioners should not have had to surrender their valuable rights to Fourth Amendment protection. This Court held such in *Frost v. Railroad Commission*, 271 U.S. 583, 593-94 (1925) when it articulated that "The power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.". This Court followed these dictates in deciding *United States v. Chicago, Milwaukee, St. Paul and Pacific R.R.*, 282 U.S. 311 (1931); *Sherbert v. Verner*, 374 U.S. 398 (1962); *Garrity v. New Jersey*, 385 U.S. 493 (1966); *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Graham v. Richardson*, 403 U.S. 365 (1973). Other federal courts similarly decided that coercive and intimidating state power which required surrender of constitutional rights was an unequal and unfair tradeoff. This was decided in *United States v. Albarado*, 495 F. 2d 799 (2nd Cir. 1974); *Blackburn v. Snow*, 771 F. 2d 556 (1st Cir. 1985); *Serpas v. Schmidt*, 827 F. 2d 23 (7th Cir. 1987); and *McDonnell v. Hunter*, 809 F. 2d 1302 (8th Cir. 1987) where the Court held that " the state may only use a consent form which delineates the rights of employees . . . and which does not require a waiver of any of those rights." *Id.* at 1310. The Michigan Court of Appeals decision ignored nearly one complete century of well-established federal precedent applicable to the states.

VI.

THE COURT OF APPEALS FAILED TO ADDRESS THE FACT THAT THIS WAS THE FIRST OFF-TRACK INSPECTION CONDUCTED BY THE MICHIGAN RACING COMMISSION SINCE ITS REGULATION OF PARIMUTUEL HORSERACING COMMENCED IN 1933. THE FACT THAT HORSERACING IN MOST JURISDICTIONS IS VIEWED AS A PERVASIVELY-

REGULATED INDUSTRY DERIVES FROM THE FACT THAT IT HAS SATISFIED THE REQUIREMENTS OF FREQUENCY AND REGULARITY OF INSPECTION AS DECIDED BY THIS COURT. THE COURT OF APPEALS FAILED TO ADDRESS THE FACT THAT THESE ESSENTIAL REQUIREMENTS WERE NOTICEABLY LACKING IN THE INSTANT CASE

Many cases speak to the fact that administrative agencies must utilize warrants for anything more than the most incidental and minimally intrusive inspection. *Tart v. Comm. Of Mass.*, 949 F. 2d 490 (1st Cir. 1991); *Allinder v. State of Ohio*, 808 F. 2d 1180 (6th Cir. 1987). In *Tart*, the only inspection done without a warrant was the minimally intrusive request for proper documentation. Even here, the Court held that "the warrant requirement was obviated by reason of the administrative criteria restricting the fisheries officer's discretion to a mere request for licensure documentation." *Tart.*, at 497. The decision further stated that

> Section 2 cannot be viewed as enabling generalized exploratory inspections typically associated with intrusive administrative inspection schemes. . . . Section 2 does not empower the fisheries officer to proceed farther without a warrant. The minimally intrusive nature of a proper verbal request to produce required documentation, and the importance of the governmental interests served by the Commonwealth's permitting requirement, satisfy us that the documentation in this case did not offend the Fourth Amendment. *Tart* at 499.

The decision hardly is subjective in pointing out that any contemplated ransacking ,rummaging, intrusive search of the vessel must be accompanied by a warrant secured from a neutral magistrate.

This Court in *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) and the decision in *Bionic Auto Parts & Sales v. Fahner*, 721 F. 2d 1072 (7th Cir. 1983) emphasized that the right to conduct warrantless searches was not automatic but rather conditionally permissible in pervasively-regulated industries.

> Appellants claim that . . . a history of comprehensive regulation renders the warrant requirement superfluous. They argue that the *Colonnade-Biswell* line of cases stand for the proposition that no warrant is ever required for searches of industries with a history of pervasive state regulation. We disagree . . . the Fourth Amendment requires that a determination of the 'reasonableness' of the intrusion be made. Even in closely-regulated industries, the inspection still must be tailored to the state's proper objective and they must minimize the dangers inherent in the unbridled exercise of administrative discretion. *Id.* at 1079.

In *Tallman v. DNR*, 421 Mich 585 (1984), Michigan adopted a standard of conduct and requirements pertaining to the inspections of pervasively-regulated industries. That decision, concerning a fisheries case, noted the exigent circumstance involved with inspecting a highly mobile ship on the high seas. The Michigan Circuit Court in the instant case easily discerned that no search exigent circumstance existed

at petitioners' horse barn. The fact that it took the respondents more than 10 days to conduct this inspection following their notification from the state testing lab highlights the fact that it was not an exigency and they did not consider it so. The Circuit Court thoroughly evaluated the search with respect to the *Tallman* guidelines and found it to be deficient constitutionally. The appellate decision never referred to *Tallman* even though it is the standard when evaluating cases involving pervasively-regulated industries.

This Court, in deciding *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), *United States v. Biswell*, *supra*; *Donovan v. Dewey, supra*, and *New York v. Burger, supra*, formulated a framework of requirements for statutes and inspection schemes regulating pervasively-regulated industries. It required more than a self-description of pervasive regulation to be included in this restricted group of industries. There was the requirement of a comprehensive regulatory scheme and an urgent or important governmental interest such as public health, public safety, national security, or the depletion of irreplaceable natural resources. Most statutes regulating pervasively-regulated industries contain language which states that warrantless inspections will be conducted with a defined frequency and a discernible regularity. This Court upheld warrantless searches where there was a " predictable and guarded federal regulatory presence." *Donovan*, at 604.. In that case, inspections of mines were performed from two to four times annually depending on whether the operation was a surface or underground mine. That was the frequency and although the time of inspection was never disclosed to mine operators, there was an undisputed and consistent frequency and regularity of inspection. The mine owners were put on notice that inspections would be made at the frequency stated in the statute and, year after year, like clockwork, these inspections

took place. In the instant case, it is undisputed that there had been no off-track farm inspection in nearly 61 years of regulating the industry under statute. That was the regularity...there was no frequency. That provided no notice to licensees and brought about the situation where, as in the instant case, the licensee had a high expectation of privacy in his off-track facility, regardless of whether it constituted curtilage or not. There was no regulatory presence except within the confines of the restricted areas of the racetrack under exclusive racing commission jurisdiction. The Court stated that inspections may not be so " random, infrequent, or unpredictable that the owner, for all practical purposes has no real expectation that his property will from time to time be inspected by government officials." *Id.* at 599. Again, in the instant case, this Court and others before it who became familiar with the facts, faced a situation not of random or infrequent inspections but rather of not a single inspection in over 60 years of regulating the industry pursuant to statute. In *Burger, supra*, at 711, the Court noted that "The permissible scope of these searches is narrowly defined . . . in order to place restraints upon the discretion of administrative officials and investigators." Here again, petitioners heard a request for a well defined and narrow scope of inspection to which they gave consent. The boundaries of the search were greatly exceeded, without consent, and no restraints whatsoever were placed on the discretion of these respondents. Not only did the statute itself not permit warrantless searches but there was no precedent of conducting them off-track. This Court stated so clearly in *Michigan v. Tyler*, 436 U.S. 499 (1977) and *Michigan v. Clifford*, 464 U.S. 287 (1984) that warrantless administrative searches cannot be used as a pretext for searching out evidence of possible criminal wrongdoing. This is a position consistent in the long history of cases involving Fourth Amendment rights

and a legal, constitutional and judiciously prudent course of action should have been followed by these respondents.

VII.

THE COURT OF APPEALS FAILED TO ADDRESS THE ISSUE THAT A WARRANTLESS, NON-CONSENSUAL SEARCH OF THE CURTILAGE OF THE RESIDENCE SHOULD NOT HAVE BEEN PERMITTED BARRING THE PRESENCE OF AN EXIGENT CIRCUMSTANCE

Finally, although equally important to the petitioners case, the area invaded by these respondents was curtilage of the residence. It was within 75 feet of the two room residence of the petitioners. It was a structure in which the family spent most of its waking moments. They worked there, kept some of the animals there, and stored a large part of their personal possessions which would not fit inside the cramped residence. It qualified as curtilage under every legal description of that term, both in federal and state cases. This Court in *Oliver v. United States*, 466 U.S. 170, 180 (1984) defined curtilage as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life'". [quoting from *Boyd v. United States*, 116 U.S. 616,630 (1886)]. No more fitting description could describe this barn better. Petitioners had a great and reasonable expectation of privacy in that barn and felt confident enough of its inviolability that they kept personal and private property and papers there. It was completely inaccessible to the general public and was only open to the family and specific invitees. As stated in *Dow Chemical Co. v. United States*, 749 F. 2d 307 (6th Cir. 1984) and its progeny spawned by that case, the only areas of a business open to a warrantless search are those areas normally made

accessible to the general public. No portion of either of the two barns were open to the public at any time. The barn in question was purposefully constructed parallel to the main road to provide no view of the inside of the barn to passersby. Neither residence on either side of the property had a view inside that barn. It was constructed with a view towards privacy and it served that purpose. The petitioners had nothing they chose to hide but, because they spent so much time here, wished to keep their private familial interactions from public scrutiny. Their expectation of privacy within this barn was one that could and would be accepted by society without reservation. For the very same reasons that the invasion of the private workplace was objected to by the Dow Chemical Co., the petitioners similarly objected. This invasion of curtilage was illegal, overzealous, and plainly unconstitutional according to both legal precedent as well as the Michigan Constitution.

In *United States v. Dunn*, 480 U.S. 294 (1987), this Court formulated a four pronged test for evaluating whether a part of the property constituting the residence qualified as curtilage. It examined 'the proximity of the area to the home, whether the area is within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the residents to protect the area from observation by passerbys." Petitioners' property qualifies on all counts. It was where they performed the hard work which was required in racing a stable of horses. The Court in *State v. Vicars*, 299 N.W. 2d 421,425 (1980) stated that the calf shed that was part of the family milking operation was curtilage of the residence because "the area was clearly used by the defendant's family in their farming operation in such a manner that there was certainly a reasonable expectation of privacy in the shed." In *Oliver, supra*, the Court also stated that structures other than the residence itself were protected

under the Fourth Amendment. In *Roberson v. United States*, 165 F.2d 752 (6th Cir. 1948), the Court stated that a smokehouse in close proximity to the residence qualified as curtilage. In *United States v. Trickey*, 711 F. 2d 56 (6th Cir. 1983), a case relied on by petitioners, the decision held that even a leased barn which had an outward appearance of a business operation qualified as curtilage because the operator-resident had an expectation, held to be legitimate, that what was contained within the structure was private. The decision stated that

> The government submits that the appellant had no legitimate expectation of privacy in the outbuilding because it was not maintained like a home or dwelling. Rather, it was maintained in the manner that was more akin to a business. In support of this position they rely on *United States v. Bailey*, 628 F. 2d 938 (6th Cir. 1980) and *United States v. Clayborne*, 548 F. 2d 346 (10th Cir., 1978). . . . Furthermore, the assertion that the premises were maintained in a manner similar to a business does not abolish the proprietor's Fourth Amendment protections. It merely makes such protections less significant than they would be in the context of a home. The controlling factor in this inquiry is that the individual have a legitimate expectation of privacy in the premises. *Accord Rakas v. Illinois*, 439 U.S. 128, 143-48, 99 S.Ct. 421, 58 L.Ed. 2d 387 (1978). The appellant clearly has such a legitimate expectation in regard to the outbuilding and, therefore, he has standing to challenge the validity of the search warrant

and to have the evidence suppressed during the trial." *Id.* at 58.

Petitioners' barn met every test of what constitutes curtilage including the eight factor test formulated in *People v. Dinsmore*, 103 Mich. App. 660 (1981). It is inconceivable that the Michigan Court of Appeals could fail to address the issue of curtilage due to inadvertence but take great and extraordinary efforts to conceive and ascribe subjective intentions that never existed. This is a material error which deserves the attention of and clarification by this Honorable Court.

CONCLUSION

The decision of the independent hearing officer, Judge Plawecki, hired by these respondents to impartially hear the case in an administrative appeal, could scarcely be considered political. The superceding decision overturning it, by a search participant and witness at the hearing, could be considered nothing but. Judge Plawecki had the advantage of listening to all testimony and witnessing the demeanor of all who appeared before him. The Michigan Circuit Court reviewed over 800 pages of transcript testimony and more than 10 briefs as part of it's decision-making process. It evaluated the case based on both state and federal law with respect to the Fourth Amendment. The Michigan Court of Appeals overturned that decision by finding a consent that did not exist and by ignoring the intrusiveness of the search and the statutory inadequacies which made the search illegal. Petitioners strongly rely on two cases, *Allinder, supra* and *Donovan, supra*. They rely on the former because it involved similar circumstances and the decision meticulously evaluated pervasive regulation, warrantless search, and curtilage. *Donovan* is similarly important because it was here that this

Court clearly enunciated the importance of inspection frequency and regularity as part of the required comprehensive inspection schemes for pervasively regulated industries.

Petitioners have invested finances which they didn't really have and emotions which they exhausted in this case they believe in so strongly. It is their hope that if and when this Honorable Court clarifies these issues which involve all aspects of Fourth Amendment protection for individuals like themselves, it will prevent the abuses which occurred in the instant case and ensure that no similar outrageous set of circumstances victimize other Michigan horsemen. They therefore pray that this Honorable Court approve this writ of certiorari.

Respectfully submitted,

/s/_____

RICHARD J. MANCIK
KRISTINE A. MANCIK
129 Alpena
New Hudson, MI 48165
(248) 486-9349

Petitioners Pro Se

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

[Filed June 25, 1999]

No. 200882

RICHARD J. MANCIK,
Plaintiff-Appellee,

v.

RACING COMMISSIONER, MICHIGAN RACING COMMISSION, and DEPARTMENT OF AGRICULTURE,
Defendant-Appellants.

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendants appeal by leave from an order of the circuit court that reversed defendant Michigan Racing Commissioner's (hereinafter Commissioner) decision to revoke plaintiff's pari-mutuel horse-racing license. We vacate the circuit court order and reinstate the Commissioner's decision.

I. Background Facts and Procedural History

From 1978 to 1993, plaintiff held an occupational license to participate in pari-mutuel harness racing as an owner, trainer, and driver of standardbred racehorses. Plaintiff's license was reissued by the Commissioner annually. For the last twelve years of this fifteen year period, plaintiff operated a business called the "Rick, Mancik Racing Stables." On August 1, 1993, a standardbred racehorse known as "Classic Legend"- one of the horses stabled and trained at plaintiff's place of business - won a harness race run at Saginaw Harness Raceway. At the time, plaintiff's father was named as the horse's trainer.

A routine post-race urine test of Classic Legend revealed the presence of the prohibited drug Etorphine. As a result, plaintiff's father's occupational trainer's license was summarily suspended. Thereafter, plaintiff replaced his father as the trainer of record for at least three other horses similarly stabled and trained at plaintiff's place of business. Those three horses --"Cadre," "S F Demon," and "Sad to See You" - were scheduled to race at Hazel Park Harness Raceway on August 13 and 14, 1993. On August 12, 1993, representatives from the Commissioner's office arrived at plaintiff's place of business and proceeded to search a barn located on the property. This search turned up several unauthorized and illegal drugs, as well as a number of hypodermic needles and syringes.

In a Stewards' Ruling dated August 13, 1993, plaintiff's occupational license was suspended. In their ruling, the stewards found that on August 12, 1993, plaintiff (1) was in possession of illegal injectable drags and related

hypodermic paraphernalia, and (2) had failed to cooperate as required in the inspection of Cadre, S F Demon, and Sad To See You. Following a de novo contested case appeal, the designated hearing officer concluded that the stewards' finding with respect to the drugs should be upheld, but the failure to cooperate charge should be dismissed. The hearing officer recommended a one year suspension of license and a $1,000 fine. Subsequently, the Commissioner concluded that both charges were supported by the evidence. The Commissioner then indefinitely revoked plaintiff's license effective August 13, 1993, and excluded plaintiff "from the grounds of all licensed race meeting in this state . . . through November 30, 1994." On appeal, the circuit court found that the search was unconstitutional, and thus excluded the evidence obtained. The circuit court then dismissed the possession charge, and observing that plaintiff was under no obligation to consent to an illegal search, dismissed the failure to cooperate charge as well. Finally, the court reinstated plaintiff's license.

II. Review of Circuit Court Holding: The Issue of Consent

> [W]hen reviewing a lower court's review of agency action this Court must determine whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings. This latter standard is indistinguishable from the clearly erroneous standard of review. . . . [A] finding is clearly erroneous when, on review of the whole record, this Court is left with the

> definite and firm conviction that a mistake has been made. *[Boyd v Civil Service Comm,* 220 Mich App 226, 234-235; 559 NW2d 342 (1996).]

After reviewing the circuit court's opinion, we conclude that the court committed several legal errors when examining the issue of whether plaintiff had consented to the search of the barn.

The circuit court began its examination by correctly noting that in order for a consent search to be valid, the consent must be voluntary. *Schneckloth v Bustamonte,* 412 US 218, 248-249; 93 S Ct 2041; 36 L Ed 2d 854 (1973). However, although the court indicated that it was then going to examine whether plaintiff's consent was voluntarily given when he filled out and signed his occupational license application each year, the record reveals that the court then veered off into an examination of the scope of the alleged consent search. Accordingly, the court never examined whether, given the totality of the circumstances, plaintiff voluntarily consented to a search of his place of business when filling out the license applications. *Id.* at 249; *People v Marsack,* 231 Mich App 364, 378; 586 NW2d 234 (1998).

We also believe that the circuit court erred in its examination of the scope of the consent search. The application form plaintiff filled out each year he applied for his occupational license included the following provision:

> I expressly agree to be subject to the subpoena powers of the Michigan Racing Commissioner or a written request issued in lieu of a

> subpoena and to provide the Commissioner with any and all such information or documents which the Commissioner may so request! . . . I further consent to be subject to the searches provided for in [MCL 431.71(3); MSA 18.966(41)(3)] that authorizes personal inspections, including urine and breathalyzer tests, inspections of any personal property, and inspections of premises and property related to my participation in a race meeting by persons authorized by the Racing Commissioner.

The circuit court looked at the language of MCL 431.71(3); MSA 18.966(41)(3), and concluded that the scope of any consent search authorized by the statute was limited to the racetrack grounds. We disagree with this conclusion.

MCL 431.71(3); MSA 18.966(41)(3), which was § 11(3) of the Racing Law of 1980,[1] read in pertinent part:

> In addition to the requirements of subsection (2), an applicant for an occupational license shall consent upon application and for the duration of the occupational license, if issued, to all of the following:

---

[1] MCL 431.71; MSA 18.966(41) was repealed by 1995 PA 279, effective January 9, 1996 (after the events pertinent to this case). Substantially similar provisions are included in the House Racing Law of 1995, MCL 431.316; MSA 18.966 (316).

> (a) Personal inspections, inspections of the applicant's personal property, *and inspections of premises and property related to his or her participation in a race meeting by persons authorized by the racing commissioner.* [Emphasis added.]

The plain and unambiguous language of § 11(3)(a) indicated that the scope of a consented to premises search was not limited to the racetrack itself. Rather, the scope included those areas "related to" the licensee's "participation in a race meeting."[2] Such areas routinely include off-track facilities like plaintiff's business. While it is true that other subsections of MCL 431.71; MSA 18.966(41) specifically and implicitly refer to the racetrack, this does not mean that § 11(3)(a) is similarly limited. Indeed, the fact that § 11(3)(a) does not include either an explicit or implicit reference to the racetrack should be seen as a clear indication that the Legislature intended not to so limit its application. See *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210; 501 NW2d 76 (1993).

The circuit court also concluded that its reading of the scope afforded by § 11(3)(a) was supported by administrative role 431.4020(b), which indicates that stewards have the duty and responsibility to "[i]nvestigate any act of cruelty seen by

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[2] "Race" is defined as "a contest of speed among horses for a prize." 1985 AACS R 431.1020(a), p 863. "Meeting" is defined as "the entire period of consecutive days which is granted by the commissioner to an association for the conduct of racing." *Id.* at R 431.1010(h), p 862.

them or reported to them, whether a horse subjected to the alleged cruelty is stabled on or off association[3] grounds." 1985 AACS R 431.4020(b), p 939. Although it does not specifically so state, we believe that the circuit court focused on this role because it believed its language exemplified a presumption that was central to the court's opinion: namely, if the Legislature had meant to include off-track sites in the scope of a consent search conducted pursuant to § 11(3)(a), it would have explicitly provided for that in the statute.

We are unpersuaded. As previously mentioned, we believe § 11(3)(a) plainly indicates that the premises subject to search encompasses all areas connected to a race meeting including those found off-track. Further, given the circumstances of this case, we find the following regulatory language to be more persuasive on the issue of scope:

> A person on the grounds of a racetrack under the jurisdiction of the commissioner *or on grounds where horses which are eligible to race at the racetrack are kept* shall not have any of the following in his or her possession, in his or her personal effects or vehicle, *or in or upon premises he or she occupies or controls:*
>
> (a) A hypodermic syringe.
>
> (b) Hypodermic needle.

---

[3] "Association" is defined as "a legal entity licensed by the commissioner to conduct a race meeting." *Id.* at R431.1001(d).

(c) Other hypodermic device.

(d) A drug used for the injection or infusion of another drug into a horse. [1985 AACS, R 431.1135(1), p 875 (emphasis added).]

Finally, we also believe that the circuit court erred when examining the scope of the consent search agreed to verbally by plaintiff on August 12, 1993. Earlier in its opinion, the circuit court found that the officials who conducted the search had asked for permission to examine the three horses and their related tack. Later, the court also found that "[t]here is no disputed fact that [plaintiff] did not agree to the search of closets, cabinets, and the interior of the barn at the time of the inspection." We believe that this finding was based on an improper focus on plaintiff's subjective intentions.

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange." *Florida v. Jimeno,* 500 US 248, 251; 11 S Ct 1801; 114 L Ed 2d 297 (1991). The question thus presented is whether a reasonable person would believe that plaintiff's consent to search the horses and their related tack included consent to search the barn and areas within it that might be able to hold the tack. We conclude that such a belief is objectively reasonable. Plaintiff placed no express limitation on the scope of the searchers' examination of the tack. For example, he did not say that they could examine any tack in plain view, but were not allowed to look in unlocked containers inside the barn where

such items would normally be found. Further, given that a few days earlier one of the horses trained and stabled at plaintiff's place of business had tested positive for an unapproved drug, we believe a reasonable person would have understood that those searching the horse and their tack would be looking for other illegal drags and hypodermic paraphernalia. Under these circumstances, we believe that a reasonable person would conclude that the person had the right to search containers inside the barn. *Id.*

Even though the circuit court committed the above noted legal errors, we do not find it necessary to remand to the circuit court for further proceedings. Applying the proper principles of law to the record before us, we conclude that plaintiff voluntarily consented both verbally and in his license application to the search conducted. Therefore, we hold that the holding of the lower court is vacated, and the decision of the Commissioner is reinstated.[4]

/s/Donald E. Holbrook, Jr.
/s/Peter D. O'Connell
/s/William C. Whitbeck

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[4] Because the issue of consent is dispositive, we need not address the constitutional challenges posed by plaintiff. *Detroit v Sledge,* 223 Mich App 43, 47; 565 NW2d 690 (1997).

APPENDIX B

STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

[Dated January 3, 1997]

No. 95-501-656

RICHARD MANCIK,)
Plaintiff,)
)
v.)
)
THE MICHIGAN RACING)
COMMISSION, et. Al.,)
Defendant.)
)

(Corrected copy)

JUDGE'S OPINION

PROCEEDINGS HAD and taken in the above-entitled matter before the HONORABLE JEANNE STEMPIEN, Judge of the 3rd Judicial Circuit Court in Detroit, Michigan on Friday, January 3, 1997.

APPEARANCES:

JAMES L. FEINBERG & ASSOCIATES
JAMES L. PEINBERG, P 13341

2632 Buhl Building
Detroit, Michigan 48226
313-962-8280

Appearing on behalf of the Plaintiff, Richard Mancik.

ATTORNEY GENERAL, Racing Division
JOHN M. CAHILL, P29700
Suite 300,
One Michigan Building
120 N. Washington Square
P.O. Box 30217
Lansing, Michigan 48909
517-373-3517

Appearing on behalf of the Defendant, the Racing Commission.

Friday, January 3, 1997
Detroit, Michigan
(About 12:30 p.m.)

THE COURT: Regarding the matter of the appeal of RICHARD MANCIK.

MR. FEINBERG: James Feinberg for the Plaintiff, Richard Mancik, M-A-N-C-I-K.

MR. CAHILL: Your Honor, John Cahill appearing, representing the Racing Commission. Just as a preliminary matter. I don't believe I have received a personal appearance

from Mr. Feinberg. Perhaps he could enter that on the record now or just did --

THE COURT: I believe that at the time we last had oral argument -- I don't remember her name, it was a woman attorney -- I think she brought over a notice of appearance. That was my recollection.

MR. CAHILL: Your Honor, there is a separate civil action. That's what you're referring to there.

MR. FEINBERG: If it hasn't been done, I will make sure it's filed.

THE COURT: Fine. Briefs have been filed in this matter. Oral arguments have been conducted. The Court has reviewed the transcripts, the records, and the exhibits. Everything has been submitted to me at consideration including, I think, 2 sets of supplemental briefs.

This will serve as my opinion. I'm going to read it into the record. The order will follow simply saying that for the reasons stated in the opinion given on the record on January 3rd, 1997, so on and so forth. Okay.

Petitioner seeks an appeal from an Administrative Hearing by the Racing Commissioner.

A hearing was held over a 2-week period of time by a Referee appointed by the Racing Commissioner.

The Hearing Officer Mr. Mark Plawecki, concluded that Richard Mancik, the Petitioner in this case, did not

violate his obligation to cooperate with the examination of several horses. He further found, that if the Constitutionality of the search was upheld, Mancik violated Administrative Rule 431.1135 which prohibits possession of hypodermic needles on grounds where eligible horses are kept.

Racing Commissioner, Nelson Westrin, who was a personal participant in the search, overruled Mr. Plawecki.

Mr. Westrin, in this 34-page opinion, chose to address the constitutionality of the search in a lengthy dissertation, concluding that the search was Constitutional. His opinion has no affect whatsoever on this appeal, and it is not an appeal from his conclusion that the search was Constitutional.

An administrative agency cannot decide a Constitutional challenge to the statute or to the search itself.

The facts, with few exceptions, are agreed upon between the parties as to the circumstances of the August 12th, 1993 search.

On August 1, 1993, Petitioner's father was a trainer of a horse name Classic Legend that was disqualified because of the presence of Etorphine. Petitioner Richard Mancik was the driver on that date of that horse.

MCL 439.71 provides that the trainer, being Frank Mancik, is the absolute insurer of the horse's condition during a race. Accordingly, Frank Mancik was suspended. Richard Mancik substituted as trainer for his father on 3 other horses that were scheduled to race on August 13th and 14th, 1993, at Hazel Park RaceWay.

Frank Mancik and several other trainers kept horses at Richard's Mancik's farm in Northville, Michigan.

On August 12th, 6 individuals from the Office of the Racing Commissioner went to the farm: Nelson Westrin, William Frank, the Veterinarian, Mr. Smith, the Steward, and investigators Swan, Jewell, and Grajek.

Westrin wrote in his opinion that the reason for the search was the seriousness of the Etorphine positive involving Richard's father as well as the close racing ties between Richard and his father and 4 other race horses kept and trained at Richard's farm and, therefore, the search was planned.

This is the opinion overruled Mr. By Plawecki.

Mr. Smith testified before Mr. Plawecki that the Mancik's farm was one of 3 places that the officer of Racing Commissioner was hoping to check to "show presence."

The request made by the searchers upon arrival was to inspect the horses, and their tack. And, then there is a disputed issue of fact as to whether or not the phrase, "other areas" was spoken to Mancik. Mancik claims that the only request was to look at the horses and tack.

Mancik agreed to produce the horses. He obtained a horse from outside of the barn, and while he was doing that, the general search was conducted by the ORC of the interior of the barn including closed trunks and cabinets.

The horses that were requested to be inspected according to Mancik, whose testimony is uncontradicted, were located outside of the barn.

There is no dispute that Mancik voluntarily produced one horse and brought it to the Vet for examination. And, the Veterinarian began an examination, but abandoned it, or was distracted by the investigators while they were conducting the general search of barn.

The respondent, Officer Racing Commissioner, did not obtain any search warrant for the contents of the barn. The central issue in this case is the validity of the search. Petitioner claims that the statute under which respondent claims the search authority was too broad and vague, it's unconstitutional.

Petitioner further claims that if a warrantless administrative search is performed, it must serve a regulatory purpose and have statutory limitation on its scope.

Respondent Racing Commissioner's position is 3-fold: The first argument is that the statute gives the Racing Commissioner very broad, comprehensive search powers.

The second argument put forth in the briefs is that Mancik consented to the type of search conducted through his application for license.

And the third argument proposed is that the powers of search are used narrowly within the boundaries of the United States and Michigan Constitutions, which thereby allowing an administrative warrantless search.

The ORC states that the search powers were based on the consent of a licensee, but of a consent of a licensee pursuant to MCL 431.71, and the powers bestowed upon the Racing Commissioner pursuant to MCL 431.66.

MCL 431.71 consent provisions are:

3 (a) Personal inspections, inspections of the applicant's personal property, and inspections of premises and property related to his or her participation in a race meeting by persons authorized by the Racing Commissioner.

3 (b) If the applicant is applying for a racing official, jockey, driver, trainer, or groom license, or for any other license for an occupation that involves contact with or access to the horses, barn areas, or stables, the applicant shall agree as a condition of licensure to submit for the duration of the license period to a breathlyzer test, urine test, or other non-invasive fluid test to detect the presence of alcohol or a control substance as defined in Section 710 of the Public Health Code. This is if directed to do so by the Commissioner or his or her representative.

If the result of a test show that a person has more than .05 percent of alcohol in his or her blood, or has present in his or her body, a controlled substance, the person shall not be permitted to continue in his or her duties on that race day, and until he or she can produce, at his or her own expense, a negative test result.

There is more to that section of the statute, but that basically encompasses the allegation of consent, and consent that is referred to in the application.

MCL 431.66 power provisions of the Racing Commissioner are:

That he shall promulgate rules pursuant to the administrative procedure act under which horse racing shall be conducted within this State.

The rules promulgated under this section shall accomplish all of the following:

(A) Government restricting, or regulating a uniform system of betting on races to be used at each racetrack in this State.

(B) Promoting the safety, security, growth, and integrity, of all horse racing conducted within this state.

(C) Licensing and regulate each person participating in or having to do with horse racing within this state.

Respondent's brief cites statutory provisions, which at first glance, appear to give unfettered right to the Commissioner. Some of these that were cited I will give as an example. This is not a complete list that was presented to me in the brief, but some of the highlighted powers of the Commissioner that were pointed out by respondent are that:

All changes on property of a licensee shall be subject to the approval of the Racing Commissioner.

Racing Commissioner can require the removal of any employee involved in racing for cause.

The matter of consent: Urine sample and breathlyzers:

Racing Commissioner can visit or place auditors in any licensee's place of business.

Any violation of the racing law or the rules is a misdemeanor punishable by $10,000 fine and 1 year in prison.

The respondent recites many more examples to demonstrate how vast the power of the Commissioner is in Michigan.

It appears to this Court that this rationale is at odds with clear constitutional requirements that regulatory searches and powers statutorily have the inclusion of reasonable limitation of searches, and that the search does not intrude upon reasonable expectations of privacy even when it is one of consent. Citing **TALLMAN v DNR**, 421, Mich 585, (1984).

The idea that the Racing Commissioner has the right to approve and obviously prevent alterations or improvements to Mancik's barn, which is off track, is patently absurd.

Mancik's premises are not licensed, rather he is licensed as an occupational licensee, a driver and a trainer.

According to the respondent's position, because Mancik stores horses that may some day be entered into a race, his barn is within the powers of the Commissioner.

It is uncontradicted by any testimony that the barn is used also to store non-racing animals and personal items.

I don't believe that the Commissioner really suggests in his brief that he can approve building alterations to this barn. Does the Commissioner suggest that he can have an auditor or some other person posted at this barn? If so, what limitations? 24 hours per day? Daylight hours?

Recitation of these powers is not convincing to the Court that the Commissioner is not subject to limitations of his search powers.

A search conducted pursuant to a valid consent is Constitutionally permissible. However, it must be voluntary and knowingly.

SCHNECKLOTH v BUSTAMONTE, 412, US, 218 (1973). In the instance case, the issue is one of voluntariness. What Did Mancik consent to when he signed his application for license.

The application states that he consents to the subpoena powers or other written requests in lieu of a subpoena for documents or information requested. It also states that he consents to be subject to searches as provided by MCL 431.71.

And further "that authorizes personal inspections, including urine and breathlyzer test, inspections of any personal property, and inspections of premises and property related to my participation in a race meeting by persons authorized by the Racing Commissioner."

The test of MCL 431. 71, must be read in its in entirety to determine the extent of consent. Section 11:

(1) Refers to racing officials, veterinarians, security guards, vendors, drivers, trainers, etc., operating within the barn area of a licensed racetrack.

(3) (B) States that the consent includes submitting to a breathlyzer test or urine test to detect alcohol or a control substance.

If the test shows more than 5 percent, .05, the person shall not be permitted to continue in his or her duty, and I emphasize the words, **On that race day** and until they can produce a negative result.

It is clear that the alcohol and drug testing of individuals is restricted to the grounds of the racetracks. A blood alcohol level of .05 may be related to performance at the track, but is certainly not illegal in the State of Michigan, nor does it render it illegal to be .05 blood alcohol by having the mere presence of a licensee on an off-track premise such as Mancik's barn.

The Court doubts that even the ORC would even propose that it had the authority to test Mancik for blood and alcohol as he happened to walk through his barn on his private property.

MCL 431.83 states that the ORC may conduct random testing in any horse within the racetrack. The statute does not make any exception for off-track premises.

The rules promulgated by the ORC refer to grounds as association grounds, meaning, racetrack. In fact, Rule 4312.4020 (b) specifically authorizes investigation of cruelty

to horses, whether the horse is stabled on or off association grounds. The fact that off-ground stables are specifically mentioned in that section is significant.

It demonstrates, contrary to respondent's position, that there is, in fact, the difference between activity and powers on racetrack grounds, and powers at stables not within the track's possession, such as Mancik's private real estate.

Mancik states that MCL 431.713 (a) is unconstitutional:

Given respondent's position that off-premise searches are consent searches according to that statute, the ORC would then logically have the following powers:

1. Personal inspections.

2. Personal property inspection.

3. Inspection of the premises and property related to participation in the race meeting.

Now, this is an important distinction. Items 1 and 2 in that sentence are separate descriptions of power from item No. 3.

Items 1 and 2 are not qualified. They are without limit in any manner. It is assumed that the Legislature wrote the law without redundancy.

Item No. 3 as a separate item, clearly says inspection of premises and property related to participation in race

meetings separate and distinct from personal property inspection. Separate and distinct from personal inspection.

Items No. 1 and 2 by the language, the clear language of the statute, need not be connected to racing in any way since they are listed separately from those items related to participation in a race meeting.

Mancik certainly did not voluntarily consent in his application to strip searches, car searches, and luggage searches off race track premises. It is questionable whether consent extends to association grounds, but given respondent's argument that warrantless searches are needed for spontaneous action, because needles are so quickly administered and disposed of, may justify the unfettered right of search of persons and property while at the race track because the Governmental interest at that movement is paramount: For the protection of State funds from gambling as listed in the briefs; and secondly, the protection of the wagering public.

This statute 3 (a) read literally, and it is unequivocal, outside association grounds would be unconstitutional since it is wholly unfettered by any limit on the time scope or manner.

Literally, a licensee could be subject to a personal search while dining at a restaurant. His luggage could be searched, his car and his belongings while on family vacation.

It does matter whether or not the racing Commissioner decides to utilize it in that manner or not, that is not the test. The test is what is the language of the statute? We do not leave these matters to the public officials in charge, at their

sole discretion. That's where the unconstitutionality of outside association grounds comes in.

This barn search exceeds the reasonable limitation on the expectation of privacy that a licensee gives up to pursue their occupation, but if within the context of race track grounds, it is considered, it may survive Constitutional muster.

Those facts are not presented to me. I have no evidence of the policies and procedures and rules for on on-track inspection. I do not and it is not necessary to specifically decide the constitutionality of the statute in whole in this case.

There is no dispute that Mancik agreed to an inspection of the horses, and he cannot challenge that search if the ORC would have completed it.

MCL 431.83 only allows for horses at the racetrack. Arguably, the administrative rule may be interpreted to include off-ground inspection of horses due to its language because it specifically mentioned horses on the grounds and those eligible to race.

That issues is moot though because Mancik agreed verbally to such a search and, therefore, it would have been valid. There is no disputed issue of fact that Mancik did not agree to the search of closets, cabinets, and the interior of the barn at the time of the inspection. He did not.

It is a violation of MCL 431.84 to have unauthorized drugs and needles on racetrack grounds or within the stables where eligible horses are kept.

The prohibition by law, however, cannot serve as a basis for a warrantless search. The authority for a warrantless search is embodied in case law and the Constitution.

The racing statute is silent as to warrants for searches. A warrantless search is unreasonable per se and violates the Michigan Constitution unless shown to be an exception to the rule, **TALLMAN v DNR**.

The liquor Control Commission warrantless searches have been upheld on licensed premises. A statute provides that they are conducted on a licensed premises during business hours, or with the owner present. A warrant is required for OSHA provisions, **MARSHALL v. BARLOW**, 436 US, 307 (1978).

Since OSHA is generic, which applies to all business, there is no consent to a search.

In TALLMAN, the Michigan Supreme Court adopted the pervasively regulated industry doctrine as it applies to warrantless searches of commercial fishing boats.

The Court stated that because the fish of the Great Lakes were State property, there is a Governmental interest.

The exigent factors that are traditional and required to justify a warrantless search were present, that is the fish on the boat are easily dispose of, and so could the illegal

equipment. The Court ruled then that conflicts under the Michigan Constitution between enforcement needs of Government agencies and private interest of regulated commercial actors, should be resolved by balancing these factors:

1. The existence of expressed statutory authorization for search or seizure.

2. The importance of the Government interest at stake.

3. The pervasiveness and longevity of industry regulation.

4. The inclusion of reasonable limitations on searches in statutes and regulations.

5. The Government's need for flexibility in the time, scope, and frequency, of inspection in order to achieve reasonable levels of compliance.

6. The degree of intrusion occasioned by a particular regulatory search.

7. The degree to which a business person may said to have impliedly consented to warrantless searches as a condition of doing business so that the search does not infringe upon a reasonable expectation of privacy.

There are no Michigan cases on point decided, specifically, whether warrantless searches of off-track

premises by the ORC on commercial property is Constitutional.

Using these factors in the instance case, the circumstances of an off-track premises warrantless search:

Criteria No. 1, there is an expressed search authorization.

Criteria No. 2, is satisfied. There is an important Governmental interest at stake. This has been set forth in -- it is cited in the briefs. Counsel, I don't have it written in my notes here. I don't have it at hand.

Criteria No. 3, the pervasiveness and longevity of industry regulation.

Despite respondent's claim to the contrary, there are no other searches on the record of randomly conducted, nonspecific intent searches at private stables.

The industry itself has a long, long history of track regulation, but none of off-track searches. Those few cited in the respondent's supplemental brief by the respondent, only refer to testimony taken by Mr. Mark Plawecki. And the best evidence is that there were 2 visits for various specific reasons to tell the trainer to stay away from another trainer, I believe, and also to advise someone of action having been taken by the Officer Racing Commissioner. It was not a random search.

Criteria No. 3 is not satisfied.

No. 4, the inclusion of reasonable limitation on searches and statutes and regulations. There are no limitations with respect to personal inspection and personal property under MCL 431.713, (a). Searches can be taking place anywhere, any time, any place, including non-racing related premises by it's language, unless the statute is read and upheld in it's narrowest sense, and that is to allow on track unfettered right to search, not warrantless searches off-track, Criteria No. 4 is not satisfied.

The need for flexibility in time, scope, and frequency, to achieve regulatory compliance. That's criteria No. 5.

This has not been demonstrated for off-track property. The Government interest is clear, it is to stock or prevent an unlawful drugging or manipulation of horses. The best time and place to do that is at the track. To test at random or search at random at the track will reveal drugs in horses; personal inspections, personal property inspection, will at random, will discover paraphernalia that is prohibited.

Inspecting a horse that may never ever race again, is not necessary to protect the Government's interest. If the horse is to race, what better time and place to check the horse, its licensee, than at the association grounds?

Mancik had non-racing animals at his barn. Presumptively, private stables would have dual uses, racing horse as well as non-racing horse, and other animals. The ORC has no compelling interest in these other animals, or even in horses that would never enter a racetrack ground. It's interest is limited to solely animals that race and are subject to gambling.

Criteria No. 5, is not satisfied.

Criteria No. 6, the degree of intrusion occasioned by a particular regulatory search.

Interestingly, this criteria was put in by the Supreme Court even though in TALLMAN they said we can't address it because the search never occurred.

Well, we did have a search that occurred here, so it can be addressed now.

The intrusion here was significant:

Six Government agents, without a warrant, investigated, invaded private property and randomly searched an entire barn without any specific stated purpose except to show presence, or because of the seriousness of the violation of drugs 12 days before that.

Respondent's claim that the barn searches take 15 minutes is simply not credible. What barn search is the Racing Commissioner talking about? If there had not been any other off-track general searches prior to Mancik, how can he claim a time?

The testimony and hearing completely nullifies this contention. This Court asked the respondent to produce a list which they said they had of other searches and it could not, without the exceptions of those visits testified to at Mr. Plawecki's Hearing in 1994.

There were no searches submitted by a list to this Court. This search that occurred here resembles many of the major drug bust searches that I have seen as a Judge, except in those, they usually have a warrant.

Criteria No. 6, does not favor the Respondent either.

Criteria No. 7, the degree of consent is a condition of doing business. I previously addressed that.

I conclude that a warrantless search even under the criteria of **TALLMAN v DNR**, if a Court would decide that warrantless searches in regulatory agencies are always authorized, they did not, in this case for off-track premises, did meet the criteria of **TALLMAN v DNR**.

NEW YORK v BURGER, 482 US, 691 (1987) case which decided post-TALLMAN.

The criteria for warrantless searches of closely regulated businesses which operate with a reduced expectation of privacy was set out by the US Supreme Court:

1. The regulatory scheme must reflect a substantial Governmental interest.

2. The warrantless inspections must be necessary to further regulatory scheme. And -

3. The inspection process must offer a Constitutionally adequate substitute for a warrant in that it offers certainty and regularity in it's application.

Regulatory scheme of the ORC does reflect a substantial Governmental interest. The warrantless inspection of off premises -- that means non-association grounds, whenever I say off-premises -- the inspection of the off-premises barn does not serve though the regulatory scheme all that can be accomplished that is necessary on the racetrack grounds, personal inspection, horse inspection.

This really can't be called a process because it's not been done, and this one was the first one. It does not offer any certainty or regularity of it's application. It cannot possibly give licensees the required advance knowledge that they would be subject to off-track searches. The ORC by admission, doesn't have a list of private barns where eligible horses are kept, they don't know where all the barns are in this State. So, how can they have a regulatory scheme that gives advance knowledge that one would be subjected to this type of search?

Furthermore, the statute allows inspections of not just trainers and drivers and stable owners. This is an occupation license. This statute allows inspection of property related to participation in a race meeting. This statute covers security guards, veterinarians, ticket clerks, they are all lumped together in the same classification as drivers and trainers and stable owners.

Is a security guard's gun subject to off-premises inspection because its used while on the job in anticipation of a race meeting? Can the Commissioner go out and inspect it without a warrant off-track? It is related to his duties at the track?

How about personal inspection, property inspection, which are not restricted in Item 3 in the statute. Do these people subject themselves to off-track urinalysis? How does that serve the regulatory scheme? A veterinarian is subject to the very same statute.

I would suggest that because a veterinarian has used a particular vial of medicine at the track, that when he goes back to his office, that office is not subject to a warrantless random search by the Racing Commissioner. And, the veterinarian, the ticket keeper, the security guard, are all in the same classification under the statue.

There is no protection here in terms of the certainty or and regularity. The office of Racing commissioner doesn't even suggest that they would do this type of search of anyone other than drivers, trainers and stable owners.

That is the problem with it again, we do not leave to the discretion of our public officials to choose who to apply these types of searches to.

TALLMAN, BURGER, and these other cases are somewhat distinguishable too on this concept. These are searches on the site of where the interest is to be protected. The Government in Michigan wants to protect the racing horses. They can do that at the track.

Even if an animal were to be unlawfully injected off-site of the premises, the test at the track will reveal that. If, in fact, there is no drug in that animal who was injected at the time of a race, there is no violation. So the only thing that

counts is whether at the time of the race, there is a drug that's prohibited.

If there is to be a search off-track, on-track searches would certainly give probable cause to obtain a warrant in the off-track search.

The claim that they need spontaneous unannounced arrivals to off-track sites is a red herring. If there is probable cause, search warrants are given ex-parte. There is no discussion with the person to be searched. There will be just as much of a surprise. In fact, this very case in point shows that.

After what the Racing commissioner thought was suspicious circumstances with the substitution of son for the father as trainer after the father had driven a horse that he was the insurer of as trainer, the needle was still on the ground off premises.

Those people who are to be searched pursuant to a search warrant, are neither consulted or advised in advance after obtaining a warrant.

Surprise is not a valid issue. On track it is. The matter of off-track general inspection searches of private property with mixed use, must be subject to a warrant. A warrant is issued ex-parte, it does involve the element of surprise which random searches are designed to do.

The expectation of privacy on a association ground is very, very limited, but off-tracks on your own real estate, it

is much greater. The regulatory scheme is not defeated by this ruling.

In this particular case, the Commissioner could have easily obtained a search warrant. In fact, case law for probable cause, an administrative agency search warrant is not as stringent as the probable cause shown by a criminal activity investigation.

He could have had a warrant specified to search to one who was searching for illegal drugs, needles, or any other violation that he chose to cite, but he could have gotten a warrant, and he must get a warrant.

The Constitution cannot be disregarded simply to accommodate expediency. The cornerstone of our freedom:

The constitution also provides the Office of Racing Commissioner and its agents, an adequate safe guarded remedy, a warrant for off-track invasion of persons or property.

The lack of a warrant does not aid enforcement of this Governmental interest in this scenario. Ultimately, the lack of checks and balances is destructive to Governmental interest. A warrant is readily obtainable. There no is excuse for skipping a procedural step.

So, in summary, as to the constitutionality of the statute as it applies to **association ground searches**, I make no decision.

I read the Illinois cases which dealt with on-track grounds, people who had been subject to random searches. I make no decision on that.

Off grounds, either under **TALLMAN v DNR** or the statute itself, it must be with a warrant. Therefore, by stipulation with the parties, it was agreed in their briefs that the exclusionary rule would apply to this case should the search be found to be unconstitutional, which I said it was.

Therefore, Count 1, the violation, that is, the possession of hypodermic needles on the grounds, is reversed.

Count 2, failure to cooperate with an investigation:

This is an administrative agency rule, and the Court cannot overturn an administrative agency's rule unless it's not supported by substantive and competent evidence, or it's an abuse of discretion.

There are perhaps 7 or 800 pages of transcript here, maybe more.

I find as did Mr. Plawecki that there was no refusal to cooperate.

Mr. Westrin overruling Mr. Plaweki is suspect because he was a participant in the search itself. He was a witness at the Hearing, but more than that, the grounds don't exist.

The testimony is undisputed that Mr. Mancik consented to have the individual horses examined and tack.

In fact, the examination of one horse began. It was never completed by Dr. Frank.

One does not have to consent to an illegal search, and one cannot be punished for not consenting to an illegal search. The only search at that time was legal, was the search of those horses.

I believe it maybe appropriate under the Statute as well as the verbal consent given by the individual.

The racing Commissioner abandoned the search. It never even completed the one examination of the one horse that already had been crossed tied in the barn.

Count 2 is reversed.

Those being the only grounds upon which Mr. Mancik's license was suspended, his license should be reinstated for that period of time due to annual expiration, whatever period of time that may be.

The findings of the Commissioner with respect to guilt and violations on Count 1 and 2, cannot be used as a basis for refusal to renew a new license when it comes up for after the expiration of the time left on the last license.

Someone would please submit an order just stating that for the reason on the record.

If anyone wishes to have an application for Leave to Appeal to the Court of appeals, you order the transcript, and that will serve as my opinion.

MR. FEINBERG: Thank you very much, Your Honor.

MR. CAHILL: Thank you, Your Honor.

(Whereupon proceedings conclude at about 1:29 p.m.)

CERTIFICATE

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

I, Sherry A. Scott, do hereby certify that I reported the proceedings had before the **HONORABLE JEANNE STEMPIEN**, Judge of the Circuit Court in Detroit, Michigan, and that the same was reduced to typewritten form; and that the foregoing is a true and accurate copy of my notes so taken.

/s/_____
Sherry A. Scott, 4640

This transcript was redacted by Judge Stempien pursuant to Court Rules.

APPENDIX C

MICHIGAN SUPREME COURT
LANSING, MICHIGAN

[Entered July 18, 2000]

No. 115835; COA: 200882;
Wayne CC: 95-501656 AA

RICHARD J. MANCIK and
KRISTINE A. MANCIK,
Plaintiffs-Appellants,

v.

RACING COMMISSIONER, MICHIGAN
RACING COMMISSION, and
DEPARTMENT OF AGRICULTURE,
Defendants-Appellees.

Elizabeth A. Weaver
Chief Justice

Michael F. Cavanagh, Marilyn Kelly, Clifford W. Taylor, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman, *Justices*

ORDER

On order of the Court, the delayed application for leave to appeal from the June 25, 1999, decision of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Cavanagh and Kelly, JJ., would remand to the Court of Appeals as on rehearing granted with the direction that it address the constitutionality of the warrantless search of the off-the-racetrack stables of plaintiffs-appellants.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 18, 2000 /s/_____
CORBIN R. DAVIS

APPENDIX D

STATE OF MICHIGAN
THE OFFICE OF THE RACING COMMISSIONER

[Filed September 19, 1994]

IN THE MATTER OF:	)
	)
The Appeal of Richard Mancik from	)
Hazel Park Harness Raceway Stewards'	)
Ruling Number 118 dated June 27, 1993.	)
	)

FINDINGS OF HEARING OFFICER
SUMMARY OF PRE-HEARING FACTS

Richard Mancik, owner/driver/trainer in Michigan, had his license in all capacities suspended August 13, 1993, for 1) having in his possession and on the premises and property related to his participation in a race meeting, hypodermic paraphernalia and 2) failing to cooperate in the inspection and examination of several of his horses entered in races by Office of Racing Commissioner personnel on August 12, 1993.

Mr. Mancik appealed as of right and DeNovo hearings were held at the ORC on June 27, 29, July 1, 5, 7, and 8, 1994.

EXHIBITS

The following exhibits were admitted into evidence and made part of the record:

1. Stewards' Ruling No. 118
2. Notice of DeNovo hearing
3. Occupational license of Appellant
4. List of items taken from Mancik Farm by ORC personnel
5. Partial transcript of August 16, 1993 ORC investigative hearing
6. Laboratory analysis of materials taken at Mancik Farm
7. Steward Larry Smith's report of August 122 search and seizure at Mancik Farm
8. Tape recording of Steward's hearing August 13, 1993
9. Detroit News article re: search and seizure at Mancik's Farm
10. Memorandum from then assistant AG Westrin to Racing Commissioner Quinn dated September 13, 1989

11. Report of Laboratory findings for calendar year 1988

12. Arbor Drugs, Inc. prescription printout

13. Prescription dated December 2, 1992

SUMMARY OF TESTIMONY

Upon direct examination Richard Mancik, owner/ driver/trainer, stated that he had trained and worked with horses for over 15 years. Upon his father's suspension he became trainer for his father's horses. He said on August 12, 1993 he was at his home/horse farm when around noon two cars drove up his driveway. Several men left the vehicles and one, State Steward Larry Smith, who Mancik knew, walked up to Mancik. Smith stated that they were present to inspect three of Mancik's horses entered to race that weekend and the horses' related tack. Mancik testified that he told Smith "I have no problem with that" and proceeded to get one of the horses. While he got the first horse, Mancik said the other ORC officials started to ransack the area where the horses and their equipment were stationed. Mancik then said to them "What do you think you're doing" and "Do you have a search warrant," and testified that several officials told him they did not need a warrant nor his consent to inspect his premises. According to Mancik, Smith read a racing rule to him quoting their authority. Mancik said that investigator Lionel Swann searched a cabinet in the barn and found and took out certain items.

Mancik stated that when the items were taken he demanded an inventory list. His wife called the police and an

attorney. A police officer eventually arrived and opined that the ORC officials apparently had the authority to conduct this search. The attorney' contacted told the Mancik's to tell the ORC officials to get off their property.

Mancik stated that some of the items taken were his, but most were not. He said that several hours after the ORC officials arrived he was asked to identify the other horses that they wanted to inspect and at that point he told them that they had not needed his permission previously and he was not going to give permission now.

On cross-examination Mancik said that his farm, nor to his knowledge any other farm in Michigan, had ever been searched by ORC officials. He said he believed the reason for the search was because one of his father's horses had recently tested positive for an illegal drug, Etorphin.

William Frank, veterinarian for the ORC, testified next. Dr. Frank listed his employment and training background and stated he was present at the Mancik Farm on August 12, 1993 for the search. He said that upon arrival Mancik brought back the first horse to the barn and that he, Dr. Frank, examined that horse in a cursory manner. After several minutes of this examination officials began finding items which they would bring to Dr. Frank, who would then identify them as illegal. Dr. Frank said that Mancik refused to identify the remaining horses when asked, but he (Mancik) was given a list of the items being seized.

Dr. Frank said that of the items seized, Ventipulin (albuteral), Ethodolac, Sputalysin, Caco injectable, and others are not legal to possess or use in the United States.

On cross-examination, Dr. Frank admitted that this was the first off-track search in which he took part. He stated that he could not say whether the Manciks would have received a list of the items seized had they not demanded one. He also said that of the tack boxes inspected the investigators seemed to know who was responsible for each tack box.

State Steward Larry Smith was the next witness called to testify. Smith gave his background in horse racing and said that on August 12, 1993 Mancik's Farm was one of three places the ORC was hoping to check "to show presence". His testimony regarding the search was similar to what Richard Mancik said, except to add that of the items seized from the tack boxes and cabinets, Manciks colors and logo were on them leading Smith to believe that the items indeed were those of Mancik.

On cross-examination Smith could not recall if he had his ID in plain view or not. He admitted he did not ask any of the other persons on the farm what areas they had control over. When asked his opinion of the authorizing statute, Smith said a search could be done at any time of the day or night, but that he would not go into somebody's house. He stated that horse racing is a heavily regulated industry, but that this was the first off-track search in which he took part.

Richard Jewell, criminal state investigator since 1984, testified next. He stated that Lionel Swann opened a blue and white tack box and found vials and needles. Jewel stated that he called the sheriff's office and requested an officer come to the scene when things became heated. He said that had Mancik refused to allow the search they would have stopped,

but that they were at the farm based on Frank Mancik's horse's positive test.

Jewel admitted that when he opened the tack boxes he did not know which box belonged to which horse.

John Grajek, an eleven year investigator, was the next witness, he testified to searching two tack boxes at the Mancik barn on August 12, 1993. He stated that Lionel Swann found a vial which turned out to contain an illegal drug.

Grajek upon cross-examination said that he would not have stopped the search even if Mancik had requested such action. His understanding of the search and seizure law led him to believe that the ORC officials could not have entered the Mancik house.

Lionel Swann, ORC investigator, was the following witness. His testimony was similar to Steward Smiths and he added that Mancik termed the property seized "his property" and that the ORC officials could not take it.

Upon cross-examination, Swann admitted that the reason Mancik's Farm was to be searched was because of the positive test of Frank Mancik's horse. He also said that the search of the tack boxes was general, not specific. Swann stated that there was a bit of intimidation on the part of both Mancik and the ORC officials during the search.

Racing Commissioner Nelson Westrin was the next witness called to testify. Westrin first explained how horse racing is a pervasively regulated industry. He stated that his

focus in this matter was to make sure racing rules were being followed, rather than criminal law.

Commissioner Westrin said that his agenda includes regular inspections and searches, with the Mancik search being the first, and between four and six off-track inspections occurring at later dates. He admitted that he did not feel that the ORC needed to ask for consent from Mancik regarding the search because consent was already given on the yearly license form. He said that obtaining a warrant was not necessary in this case because it is not required, and that the ORC conducted the search only to regulate racing, not to obtain evidence toward a criminal conviction. Finally, Westrin stated that since he was not in the Mancik barn, he did not know whether the investigators knew which tack boxes they were inspecting.

Christine Mancik, wife of the appellant was the next witness. She stated that she was on the grounds when the August 12 search occurred and that she only knew Lionel Swann of all the ORC personnel. She said she called the police and a lawyer also for advice, with the lawyer advising her to get the ORC people off the property without taking anything. She stated that the investigators went through her possessions kept in the barn, as well as Jason Malady's tack boxes. Ms. Mancik testified that she did not understand the "inspections and searches" clause of her occupational license application.

Gerald Malady testified next. He was present at the August 12 search and had a race horse named "Full Serve" in the barn. He said that the cabinet searches was one shared by all the people at the farm. Malady admitted being a groom

employed by Rick Mancik at that time. He also said that a horse names "War Leader" was present and was not Mancik's, but rather trained by Sharlf Cunmulaj.

Zaim Cunmulaj was then called (via phone). He was a groom present during the search in question. He stated that he became angry at the ORC officials during the search, and that he, without asking permission, drove Rick Mancik's car up behind the ORC vehicles to prevent them from leaving before the police arrived. When asked if he had any medicine, needles, or syringes in the cabinet where items were seized, Cunmulaj refused to answer, invoking his Fifth Amendment right.

State Steward Joseph Kennedy opened the last day of testimony. Questions were asked about the Steward's hearing of August 13, 1993 (on tape as exhibit 8). Kennedy could not recall if he told Dan Banfield that horses would not be allowed to race if they came from Mancik's Farm (after Mancik had been suspended). He did say that Banfield was probably told not to have any contact with Richard Mancik. Kennedy then gave his opinion on penalties for various racing offenses.

Jimmie Wright, former ORC employee, discussed a 1989 memo that referred to trying to implement coordinated activities between racing officials and police agencies. He also stated that investigators Jewell, Swann, and Grajek should not have been allowed to do a search without being supervised. Wright's view was that regulatory responsibility had been abandoned at the ORC. He said that in his 15 year tenure with the ORC, that three off-track inspections occurred, and that none were confrontational.

Sam Varlesi, ORC investigator from 1978 to 1989, then testified. He stated that in his tenure no off-track farm regulatory searches were conducted.

Richard Mancik was then recalled to show the prescription of Albuteral given to him for a horse "Michael Aaron" which he trained but did not own.

Mumtaz Kinaia, owner of Mancik's farm (leased to Mancik). He testified that he called Dan Banfield to see if he would train his horses after Mancik was suspended, but that racing officials did not want him to race out of the farm. On cross-examination he admitted that he owned "Classic Legend" which tested positive for the drug Etorphine.

Mandy McIlmurray then testified that her owner and groom license was suspended in November 1993. Michael Condon corroborated the testimony of Watson. In addition, he stated that one of his horses, "Yarra Glen" tested positive several years ago and he was given a two year suspension (reduced to 90 days).

Waldo McIlmurray was to testify about being subjected to ORC searches, but the hearing officer disallowed such testimony following ORC counsel's objection. (Note: The three previous witnesses' testimony was similarly stunted).

Daniel Banfield, licensed owner/driver/trainer/groom, testified next. He stated that none of the ORC officials questioned him at the Mancik Farm on August 12, 1993. He also said that Steward Kennedy told him not to have any

contact with Mancik (after Mancik's suspension) or that he could be suspended as well.

Paul Kennedy was the last witness sworn to testify and he stated that Watson Condon, and he all trained out of three different barns.

CONCLUSIONS OF FACT

1. On August 12, 1993 six ORC officials including recently appointed Commissioner Nelson Westrin arrived at Rick Mancik's stables in Northville, Michigan.

2. The stated purpose of the visit was to inspect three of Mancik's horses ("SF Deamon", "Cadre", and "Sad to See You") entered in upcoming races and their related tack boxes.

3. State Steward, Larry Smith, spokesman for the group, approached Mancik at around noon and stated the group's purpose.

4. Appellant Mancik proceeded to retrieve the first of the three horses from another area of the farm.

5. When Appellant returned, he found three ORC investigators rummaging through the entire barn area, overturning boxes containing his and others' belongings.

6. Appellant objected to the investigators' actions, asked to see a warrant and eventually called the police and an attorney.

7. The ORC officials stated they did not need a warrant and quoted their authority from a statute and racing rule.

8. When a law enforcement official arrived he gave the opinion that the ORC officials had apparent authority for their actions.

9. A number of items were confiscated by the investigators (exhibit 4) from the barn area. Appellant was provided a list of the items only after he demanded one.

10. Appellant refused to identify the other two horses originally requested, stating that since the ORC officials did not need his consent to search his farm, they did not need him to identify the other horses.

CONCLUSIONS OF LAW

Rule 431.1135 Hypodermic paraphernalia.

Rule 1135. (1) A person on the grounds if a racetrack under the jurisdiction of the commissioner or on grounds where horses which are eligible to race at the racetrack are kept shall not have any of the following in his or her possession, in his or her personal effects or vehicle, or in or upon premises he or she occupies or controls:

(a) A hypodermic syringe.
(b) Hypodermic needle.
(c) Other hypodermic device.
(d) A drug used for the injection or infusion of another drug into a horse.

SUMMARY

Application of the cited authority to the facts of this appeal finds that the HPHR Stewards acted only partially within their authority without abusing discretion when issuing Ruling No. 118 which suspended Richard Mancik's license, pursuant to MCL 431.71 (1)(3)(a).

The ORC contends that Appellant Mancik refused to cooperate on August 12, 1993, in identifying horses that he had entered to race at HPHR. However, the facts indicated that the Appellant behaved in a reasonable manner. The persuasive evidence (both Smith and Appellant who were privy to the conversation, substantially agree) is that when Smith and the Appellant first met, Smith stated to him that the ORC officials were there to inspect three of his horses entered to race at HPHR and related tack (boxes). Appellant did not object, but rather started to comply by bringing Dr. Frank the first horse. It was only when Appellant returned to the barn and saw three ORC investigators rummaging through his (and perhaps others') property did he begin to protest. Thus, ths scope of the purpose was exceeded. Both investigators Jewell and Swarm admitted that they did not know specifically whose tack boxes they were looking through.

The giant mystery to this case is why the officials did not wait for Appellant to complete compliance. Had he

refused, initially, to identify one or more of the horses, or said "No, you can not look in this or that tack box" the investigators would have been on firmer ground. They did not give Appellant the opportunity to comply with their request. He might have provided all three horses and their related tack boxes in routine fashion. We will never know.

This search was unprecedented in its location and manner for these reasons alone, it is unfair to find that Appellant failed to cooperate with the inspection. To find that he "affirmatively interfered with" said inspection is ludicrous, if the ORC officials are referring to the attempted "blocking" in the circular driveway by Zaim Cunmulaj to prevent their departure.

The ORC contends that the search was fully authorized by statute and rule. MCL 431.71 Section 11 (3)(a) states that "Personal inspections, inspections of the applicant's personal property, and inspections of premises and property related to his or her participation in a race meeting by persons authorized by the racing commissioner."

The ORC also argues that notice is provided for by the signing of the license application, which states in pertinent part "I further consent to be subject to the searches provided for in Public Act 327 of 1980, as amended, Section 11(3) that authorizes personal inspections, including urine and breathalyzer tests, inspections of any personal property, and inspections of premises and property related to my participation in a race meeting by persons authorized by the Racing Commissioner."

The ORC is correct in said contention. The statute and rule do appear to give full authority to a search such as the one conducted on the Mancik farm. The ORC's problem is that the statute is so vague, and this search so uniquely intrusive (because it was the first one), that it may be in violation of the Fourth Amendment of the U.S. Constitution, as well as Article I, Section 11 of the Michigan Constitution. Section 11 even refers to "curtilage" which arguably in this search is relevant because of the proximity to the Mancik house and placing of personal effects in the barn.

Nevertheless, the ORC counsel correctly points out that any constitutional argument to be made is beyond the authority of this hearing officer and can only be determined by a Court of Law.

The remaining issue to be decided is whether the illegal items seized were in fact those of the Appellant. It has been already stated that two investigators did not know whose tack boxes they were rummaging through. However, it was the Appellant's farm, the boxes had Appellant's colors and logo, and as to whether Appellant actually referred to the property as his own, Appellant's wife admitted that she said "this is <u>our</u> private property" at one point. Also, Appellant admitted that at least two of the items were his. Mindful that the standard in this hearing is preponderance only, the weight of the evidence lends credence to a belief that at least some of the items belonged to the Appellant.

CONCLUSION AND RECOMMENDATION

With respect to count 2, (that Appellant failed to cooperate) decision of the HPR Stewards is made contrary to

the weight of the material evidence. It is this Hearing officer's opinion that this charge be dismissed and no suspension or fine be given.

With respect to Count 1, the possession of hypodermic paraphernalia, the decision of the HPR Stewards is authorized by statute and based upon competent, material, and substantial evidence. This Hearing Officer recommends a one year suspension and $1,000.00 fine, with the fine to be stayed if the constitutionality of the underlying search is challenged in a court of law.

Respectfully submitted,

/s/_____
Mark J. Plawecki